

Case Law Update
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Eleventh Circuit Court of Appeals

[Booker v. Secretary, Florida Department of Corrections](#), 20-14539 (Jan. 3, 2022)

In state postconviction proceedings in a capital case, federal counsel from the Capital Habeas Unit of the Office of the Federal Public Defender obtained permission from the federal district court to represent Booker in a state postconviction proceeding in order to exhaust a Brady claim so that Booker could then pursue the claim in a successive federal habeas corpus proceeding, challenging his state court conviction. The district court appointed federal counsel for that purpose, and the State appealed, challenging the appointment of federal counsel.

The Eleventh Circuit dismissed the appeal as the “State lacks standing to bring this appeal because the district court’s appointment of federal counsel caused no injury to the State.” The Court rejected the State’s argument that the appointment of federal counsel might involve a conflict of interest. The federal counsel had previously represented Booker in state court proceedings. There were no claims by the State that the current federal counsel, when previously appearing in state court proceedings, had been ineffective.

The State also argued that “it has a stake in protecting Florida’s postconviction system from interference by CHU counsel or federal district courts.” However, when federal counsel appeared in state court, the State failed to object and the state court allowed federal counsel’s appearance. “We are hard pressed to see how Florida can come to us complaining that the district court’s order infringed its sovereignty where it did not so much as object to CHU counsel’s appearance in state court and where the state court accepted her appearance.”

Supreme Court of Florida

[Walker v. State](#), SC21-1327 (Jan. 6, 2022)

The Florida Supreme Court denied a petition for discretionary review, noting that it lacked jurisdiction to review an alleged conflict between the lower court decision of the First District Court of Appeal and another decision of the same

district. The Supreme Court’s conflict jurisdiction extends only to conflict with decisions of “another district court of appeal.”

[In Re: Amendments to Florida Rule of Appellate Procedure 9.143](#), SC20-1129 (Jan. 6, 2022)

The Supreme Court adopted a new appellate rule, 9.143, related to Marsy’s Law. For purposes of criminal and juvenile delinquency proceedings, “victim” is “defined as set forth in article I, section 16(e), Florida Constitution. Additionally, “[t]he record on appeal shall include any filing by a victim or other authorized filer on the victim’s behalf made part of the court file in accordance with Florida Rule of General Practice and Judicial Administration 2.420(b)(1)(A).” Finally, “[a] victim seeking to invoke a right under article I, section 16, of the Florida Constitution may file a motion in the court in which the matter is pending.”

First District Court of Appeal

[J.R.P.W. v. State](#), 1D21-1834 (Jan. 5, 2022)

An appeal by the juvenile from an “amended final disposition order,” seeking to challenge restitution as a condition for probation, was dismissed because the appeal was deemed premature, and the issue raised was moot.

The trial court’s initial disposition order withheld adjudication and placed the juvenile on probation; it also reserved jurisdiction for 60 days to determine the amount of restitution, while noting that restitution would be ordered. Two weeks later, an “amended final disposition order” was rendered, awarding the victim \$400 in restitution as a condition of probation. Throughout the entirety of these proceedings, a written motion for rehearing remained pending, directed towards the trial court’s original oral adjudication of delinquency. The trial court, after the previously noted written orders, orally denied the motion for rehearing and sua sponte vacated the restitution amount from the “amended final disposition order.” The court ordered that another restitution hearing would be conducted. Prior to that hearing taking place, the juvenile filed a notice of appeal, seeking review of the amended final disposition order.

The appeal was premature because there was still no written order denying the motion for rehearing and the “amended final disposition order” was therefore still not final at the time of filing the notice of appeal. Second, the issue raised by the juvenile on appeal was now moot. The juvenile was challenging the jurisdiction

of the trial court to conduct the restitution hearing orally ordered on rehearing. However, the trial court, on its own, cancelled that hearing as a result of the juvenile's filing of the notice of appeal.

Second District Court of Appeal

[S.P. v. State](#), 2D21-631 (Jan. 7, 2022)

The trial court erred in denying a motion to suppress “evidence of cocaine that was found in [S.P.’s] wallet while she was being placed into protective custody pursuant to the Baker Act.”

A deputy sheriff responded to a domestic disturbance – S.P. wanted her boyfriend removed from the house. S.P. appeared “very intoxicated,” but the officer did not believe there was a basis for taking her into protective custody under the Marchman Act. Without authority to remove the boyfriend, and no indication of criminal activity, the deputy drove away. A few hours later, the boyfriend found the deputy and said that S.P. was very intoxicated and that she had a gun and was threatening to shoot herself.

Several deputies searched for and found S.P., who was very upset at the time. The deputies were checking on her welfare. One officer, after speaking to S.P., concluded that she met the criteria for Baker Act custody. That officer, Lewis, however, did not testify at the suppression hearing, and it was not known what transpired between that officer and S.P. The first deputy, Anderson, acting on Lewis’s instructions, took S.P. into custody, and placed her, handcuffed, in the back of his patrol car. The deputy opened her wallet and found a baggie containing cocaine. He testified that he acted pursuant to departmental policy to search “any individual who is riding in the back of their patrol cars,” for the safety of both himself and S.P. The trial court denied the motion to suppress, concluding that it lacked authority to determine whether the Baker Act custody was lawful; that that was a matter solely for law enforcement.

The Second District first held that the trial court did have authority to determine whether there was a basis for taking S.P. into custody. The appellate court found, on the limited record before it, that it was a close question as to whether probable cause existed to take S.P. into custody – based on the existence of “a substantial likelihood that without care of treatment,” she would “cause serious bodily harm [to] herself or others. . . .” S.P. was not crying, and she communicated

appropriately. There had been no apparent need to contact EMS. And the officer who determined that custody was appropriate did not testify.

However, the appellate court avoided deciding the question of probable cause for custody because even if such probable cause existed, the deputy lacked a basis for opening the wallet and searching its contents without a warrant. Under the facts of this case, the Court held that it was not reasonable for the deputy to search without a warrant when S.P. “was already handcuffed and in custody in the back seat of his patrol car to be taken to a mental health facility.” While safety searches may have justification under appropriate facts, the “safety search must be objectively reasonable under the facts of the case.” While a patdown search for weapons was appropriate, “there was no need to search through S.P.’s wallet when the one weapon she was reported to have had already been seized, when she was already in handcuffs in the back of a sheriff’s patrol car, and when there was no objective basis to be further concerned for anyone’s safety.”

Third District Court of Appeal

[Allen v. State](#), 3D19-2369 (Jan. 5, 2022)

The trial court did not abuse its discretion in “not ordering an additional competency hearing sua sponte.”

Three professionals had previously concluded that Allen’s competency had been restored. At a subsequent probation violation hearing, Allen made statements which appellate counsel asserted should have triggered further evaluations. “At the time, however, these statements did not cause the trial court or defense counsel to question the Appellant’s competency. The record reflects that the Appellant at the revocation hearing never stated that he did not understand the proceeding. To the contrary, he acknowledged that a plea had been offered, briefly spoke well about defense counsel, and accepted his sentence.”

The case turned on the trial court’s observations of Allen at the lower court hearing, and those “matters take meaning from their context, which the trial court is best situated to judge.”

[Copeland v. State](#), 3D21-1913 (Jan. 5, 2022)

The Third District affirmed the denial of a Rule 3.800(a) motion to correct illegal sentence. Copeland argued that his 15-year sentence, imposed upon

revocation of probation, was “illegal because the trial court lacked jurisdiction to enter it nunc pro tunc to the date of Copeland’s probation violation hearing.”

An illegal sentence, for purposes of Rule 3.800(a) motions, is one “that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances.” The 15-year sentence here was “within the sentencing statutes.” Furthermore, there was no error in issuing the sentencing order nunc pro tunc.

Fourth District Court of Appeal

[Carbaugh v. State](#), 4D18-3591 (Jan. 5, 2022)

The Fourth District affirmed a conviction for theft of property valued between \$10,000 and \$20,000, and addressed just one of multiple issues – the sufficiency of the reconstruction of a “missing portion of the trial transcript.” The Fourth District concluded that the record, as reconstructed, was “sufficient to provide meaningful appellate review.”

The missing portion of the transcript, consisting of part of the Appellant’s trial testimony, during the course of a four-day trial, resulted in efforts, during the pendency of the appeal, to obtain the complete transcript. A corrected transcript was prepared by the reporter, but it still had a gap “due to the court reporter inadvertently failing to transcribe a part of the proceeding and no longer having access to his stenographic notes (the reporter maintains the notes and other items were stolen from his car).”

During a further relinquishment to the trial court, the parties engaged in an effort to reconstruct the missing 45-minutes of testimony. Carbaugh maintained, in the trial court, that it could not be done and the State objected. The State provided the trial court with a photo of a demonstrative chart used by the defendant during his testimony. The State asserted that the chart was used by the defendant to “show an extensive list of credit card payments that Appellant asserted supported his theory of defense.”

On the basis of the foregoing, the appellate court found that the reconstruction was sufficient. The Court emphasized that “Appellant has failed to establish prejudice as he has failed to link the missing portion of the transcript to a meritorious issue raised on appeal.”

[Carey v. State](#), 4D19-3753, 4D19-3845 (Jan. 5, 2022)

A written sentencing order was remanded for correction where it failed to conform to the oral sentencing pronouncements.

[Narvaez v. State](#), 4D20-245 (Jan. 5, 2022)

The defendant was convicted of multiple offenses, including “Battery (Domestic).” The jury instructions for that offense tracked the general battery statute and made no reference to the domestic violence statute. At sentencing, the court treated the conviction as a crime of domestic violence and sentenced the defendant to 364 days in county jail. As the offense for which the defendant was convicted was simple battery, the sentence was reversed and remanded. The designation of domestic violence could not be used as there was no finding of that by the jury. The correction was solely ministerial and did not require the presence of the defendant on remand.

[State v. P.C.L.](#), 4D20-2002 (Jan. 5, 2022)

The State appealed an order denying restitution. The juvenile stole a neighbor’s vehicle, “wedged a concrete block onto the gas pedal, and sent it careening into the victim’s Expedition and Durango parked in his driveway. Both vehicles sustained extensive damage from the impact, and the victim claimed the impact also damaged a gate. The juvenile entered a no contest plea to motor vehicle grand theft and two counts of criminal mischief in excess of \$1,000.00. The Fourth District affirmed the denial of restitution as to the gate and loss of use of a vehicle, but reversed as to damage to the Expedition an. Restitution had not been sought as to damage to the Durango.

The denial of \$800 in restitution for the Expedition’s loss of use was affirmed, as the claim was based solely on the opinion testimony of the victim and the evidence was insufficient. The victim worked for FEMA, doing hurricane damage assessment, and the work he did had, as a contractor, had strict time limits and required a specific type of vehicle to traverse affected areas. The loss-of-use claimed was for eight days, and other testimony was that he could not obtain a substitute vehicle for that time period; his six-month contract compensation would have been \$180,000; and the nature of the work was unpredictable. The victim testified he lost out on that contract as a result of the damage to the vehicle.

As to the \$800 for loss of use for eight days, “[o]ther than \$1,400.00 that was covered by insurance, the trial court found that the victim failed to provide sufficient evidence or documentation to support the loss of use and damages to the Expedition.”

Restitution for damage to the gate was properly denied absent a nexus between the car crash and that damage. There were no photos of the gate on the ground and no evidence of damage other than to hinges.

A loss-of-income claim was properly denied. The trial court concluded that the victim could have leased or bought a new vehicle within the three-day window and still fulfilled his contractual obligations. The trial court thus found that the victim failed to mitigate. That conclusion was not supported by any evidence. There was un rebutted evidence that the vehicle was inoperative and the contract work for FEMA required a suitable vehicle. There was no evidence that such a vehicle could have been found within the three-day window period provided under the contract between the victim and FEMA.

The trial court also failed to make required findings regarding the ability of the juvenile or parent/guardian to pay restitution. A new restitution hearing was required with respect to the erroneous findings by the lower court.

One just partially dissented. With respect to the loss of income, the dissenting judge construed the lower court as having found the victim’s testimony about a \$180,000 loss to be lacking credibility and thus beyond the scope of appellate review. The majority had treated the judge’s finding as being a failure to mitigate, as opposed to a credibility determination.

[Sanchez v. State](#), 4D20-2476, 4D20-2477 (Jan. 5, 2022)

The trial court erred in scoring prior Georgia burglary convictions as second-degree felonies on the Criminal Punishment Code scoresheet. These 14 prior convictions involved burglaries of dwellings. Under the CPC scoresheet, out-of-state convictions are analogized to comparable Florida offenses. Although Florida convictions for burglaries of dwellings are second-degree felonies, the relevant Georgia burglary statute does not distinguish between burglary and burglary of a dwelling. Therefore, the Georgia convictions should have been treated as third-degree felonies.

The imposition of public defender fees of over \$3,000 divided between two trial court case numbers was reversed because there was no proof of fees or costs in excess of the \$100 statutory minimum.

[Jenkins v. State](#), 4D20-2701 (Jan. 5, 2022)

Several sentencing scoresheet errors were found, but the record demonstrated, on direct appeal, that the trial court would have imposed the same sentence even with a corrected scoresheet, and the sentence was therefore affirmed.

One prior conviction for fleeing-and-eluding should have been scored as a level 1 offense rather than a level three offense. Several misdemeanor convictions were included on the scoresheet as prior convictions, but they did not appear in the CCIS database.

The various scoring changes (1.5 sentencing points) resulted in the lowest permissible sentence being reduced from 19.875 months to 18.75 months. The trial court had already rejected a request for a downward departure based on the need for treatment of a bipolar disorder. The trial court had also rejected the alternative defense request for a sentence of no more than 20 months. The judge emphasized the existence of 19 prior felony convictions and the dangerousness of the defendant. The judge stated that he would seriously consider imposing a sentence in excess of the statutory maximum if the defendant had been declared a habitual felony offender.

Prosecution costs of \$200 (exceeding the \$100 statutory minimum) were reversed due to the absence of evidence to support the higher costs. Investigative costs of \$50 per case, requested by the Sheriff's office, were reversed due to the absence of evidence to support them.

On remand, the court could entertain additional evidence and make findings, if appropriate, to support the costs assessments that were reversed. Otherwise, they were to be stricken on remand.

The special condition of probation that Jenkins' driver's license be suspended for one year was stricken because it was not orally pronounced. While the judge made an oral statement at sentencing that the court was "obligated to order his driver's license be suspended for one year," the appellate court construed this as a reference to the court's obligation to revoke the license due to the fleeing-and-eluding conviction, which the court did by separate order. It was not a reference to a special condition of probation.

[Graves v. State](#), 4D20-2728 (Jan. 5, 2022)

The Fourth District dismissed Graves’ appeal from the trial court’s denial of her admission to drug court and the resulting plea of no contest.

After a second arrest, which resulted in two pending third-degree felonies and two misdemeanors under a total of two different case numbers, the defense sought admission to drug court for both cases. The judge granted the request for one of the two cases, but found the defendant ineligible in the second case. The defense then entered a global plea, reserving the right to appeal the partial denial of placement in drug court. The defendant was sentenced to 18 months of probation on the second case and drug court on her own recognizance for the first case.

When entering a plea of no contest, a defendant may reserve the right to appeal a dispositive order. An order is deemed dispositive “only when it is clear that regardless of the outcome of the appeal, there will be no trial.” The denial of a motion to participate in drug court does not qualify as a legally dispositive order and the appeal was therefore dismissed due to lack of jurisdiction. In this case, although the defense requested that the trial court declare the issue to be dispositive, which would have resulted in jurisdiction for the appeal, the judge failed to do so. The Fourth District also noted that the order denying the motion for drug court may have been reviewable by a petition for writ of certiorari. The opinion does not explain why it did not treat the improvident appeal in the alternative as a petition for writ of certiorari. There is no indication in the opinion that there was a written order denying the request for drug court. Nor does the opinion reflect how much time transpired between the denial of the motion for drug court and the subsequent global plea.

[Perdue v. State](#), 4D21-1055 (Jan. 5, 2022)

Perdue challenged his sentence for failing to report in person to the sheriff’s office every 30 days after establishing a transient residence. A prior conviction for an offense involving lewd conduct was scored as a level 7 offense. The record before the appellate court did not reveal the statutory subsection under which Perdue had been convicted. The scoring was apparently based on the statute existing at the time of the sentencing, but it should have been based on the statute that existed at the time of the prior conviction, at which time the statutory elements were different. This matter had to be resolved by the trial court on remand.

[Shahgodary v. State](#), 4D21-1252 (Jan. 5, 2022)

A conviction for a criminal violation of an injunction for protection against stalking was reversed for a new trial because the defendant was denied the right to a unanimous jury verdict.

The jury was instructed that the defendant could be found guilty “if he violated the injunction in any of [] five alternative ways.” There was no objection to the instructions. The prosecutor argued that the jury had to find the defendant guilty only of one of the five alternative means of violating the injunction. “Although the trial court also instructed the jury that its verdict needed to be unanimous, it did not clarify that the jury was required to unanimously agree on at least one of the five specific acts.”

Some of the jurors might have believed the defendant came within 500 feet of the injunction petitioner’s home; others may have believed the violation was for coming within 25 feet of her vehicle; others may have opted for one of the other possible violations. “Under these circumstances, it is difficult, if not impossible, to determine for which act the jury convicted the Defendant, or if the jury reached a unanimous decision.”

Although it was error to instruct the jury that a conviction could be based on communicating with the family of the injunction petitioner or household guests of the petitioner, the error was unpreserved and was not fundamental. The relevant statute proscribes only communications with the injunction petitioner.

[Bess v. State](#), 4D21-1387 (Jan. 5, 2022)

The evidence was insufficient to support civil commitment under the Baker Act.

The Appellant was bipolar and having a manic episode. After a psychiatrist saw her in a hospital emergency room, by the next day, she was 50% better but in need of medication. The doctor still believed that she was in danger of hurting herself or others. This testimony was insufficient. “The doctor did not testify to any altercations between appellant and other patients or staff since appellant was Baker Acted in the hospital emergency room. Nor had appellant evinced any suicidal ideation or done anything to harm herself. His opinion was not based upon recent behavior causing, attempting, or threatening harm. He could only point to an assault

by appellant several years ago. That is not recent behavior, and this there was no evidence to support his conclusion of a likelihood of harm.”

[Evans v. State](#), 4D21-1492 (Jan. 5, 2022)

The Fourth District cited and quoted the Florida Supreme Court’s recent opinion in State v. McKensie, for the point that a “circuit court has jurisdiction to impose a sexual predator designation on an offender who qualifies under section 775.21, when the sentencing court did not impose the designation at sentencing and the offender’s sentence has been completed.”